Ang Kee Sim v Kembang Jaya Development Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-457 OF 2000
KAMALANATHAN RATNAM J
27 JUNE 2001

Land Law *— Housing developers — Delay in completion — Extension of time from controller — Application for extension made after expiry of 24 months stipulated in agreement — Whether court to exercise discretion to allow extension — Housing Developers (Control and Licensing) Regulations 1989 reg 11(3)*

The plaintiff entered into a sale and purchase agreement dated 17 May 1996 with the defendant as the vendor in respect of a particular piece of property. The defendant failed to complete the contract and deliver vacant possession within the stipulated time. The delay from the date of delivery was 813 days. The plaintiff calculated the liquidated damages due for the delay and set off RM32,297.26 from the final progress payment due to the defendant and demanded the balance of RM3,297.26. The defendant refused and hence the suit. The only argument raised by the defendant was that before the defendant could seek a prayer for specific performance and the consequential orders, the plaintiff himself must honour the agreement by making full payment first. This was because the developer had applied to the Ministry of Housing for an extension of time. Counsel referred the court to a letter from the defendant to the Controller, Ministry of Housing and Local Government ('the controller') dated 22 July 2000 seeking an extension of time to complete the payment.

Held:

(1) The proviso to reg 11(3) of the Housing Developers (Control and Licensing) Regulations 1989 stated clearly that an application to the controller for extension of time would not be approved unless it was made before the expiry of the 24 months stipulated in the agreement. Here, the defendant made this application for extension of time on 22 July 2000 stating various reasons. Yet three days later, the defendant was able to put right the long list of complaints enumerated in its letter dated 22 July 2000 being the reasons why it was seeking the extension of time. Obviously that application was made as an afterthought to prop up its case to defeat this legitimate claim of the plaintiff. In any case, the defendant was caught by the proviso. As the application was made at least three years and two months after the completion date, the application was a non-starter (see pp 319I–320B).

(2) In any case, since the application was made out of time there was no room even for the court to exercise any discretion. The court did not, even at this point, have to consider that there was no certificate in writing from the controller giving the defendant the

A extension of time sought. Clearly, the plaintiff was entitled to the damages (see p 320B–C).

[Bahasa Malaysia summary

B Plaintif telah memasuki satu perjanjian jual beli bertarikh 17 Mei 1996 dengan defendan sebagai penjual berhubung sebidang hartanah tertentu. Defendan telah gagal untuk memuaskan kontrak tersebut dan menyerahkan milikan kosong dalam masa yang diperuntukkan. Kelewatan dari tarikh pemberimilikan adalah 813 hari. Plaintif telah mengira ganti rugi jumlah tertentu akibat daripada kelewatan tersebut
C dan menolak RM32,297.26 daripada pembayaran pengendalian terakhir dan menuntut baki RM3,297.26. Defendan enggan dan oleh itu wujud guaman ini. Satu-satunya hujahan yang ditimbulkan oleh defendan adalah sebelum defendan boleh memohon satu permohonan untuk pelaksanaan spesifik dan perintah selanjutnya,
D plaintif sendiri mesti menepati perjanjian tersebut dengan membuat pembayaran penuh terlebih dahulu. Ini adalah kerana pemaju telah memohon kepada Kementerian Perumahan untuk satu lanjutan masa. Peguam telah merujuk kepada mahkamah sepucuk surat daripada defendan kepada Penguasa, Kementerian Perumahan dan Kerajaan Tempatan ('penguasa tersebut') bertarikh 22 Julai 2000
E yang memohon satu lanjutan masa untuk menyelesaikan bayaran tersebut.

Diputuskan:

F (1) Proviso kepada peraturan 11(3) Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1989 menyatakan dengan jelas bahawa permohonan kepada penguasa untuk lanjutan masa tidak akan dibenarkan kecuali jika ia dibuat sebelum tamat 24 bulan yang diperuntukkan di dalam perjanjian. Di sini, defendan telah membuat permohonan untuk lanjuatan masa ini pada 22 Julai 2000 dengan menyatakan pelbagai sebab. Namun,
G tiga hari kemudian, defendan dapat meremedikan perkara-perkara dalam senarai panjang aduan yang tertera di dalam suratnya bertarikh 22 Julai 2000 yang merupakan sebab kenapa ia memohon lanjutan masa. Adalah nyata bahawa permohonan tersebut dibuat kemudian bagi mengukuhkan kesnya untuk
H mengagalkan tuntutan sah plaintif. Dalam keadaan ini, defendan terjerat dengan proviso tersebut. Memandangkan permohonan tersebut telah dibuat sekurang-kurangnya tiga tahun dan dua bulan selepas tarikh penyelesaian, permohonan tersebut tidak boleh dimulakan (lihat ms 319I–320B).

I (2) Dalam apa keadaan pun, memandangkan permohonan tersebut dibuat di luar had masa tiada ruang sekalipun untuk mahkamah menggunakan apa-apa budi bicara. Mahkamah tidak, sekalipun di saat ini, perlu mempertimbangkan bahawa tidak terdapat sijil

secara bertulis daripada penguasa tersebut yang meberikan defendan lanjutan masa yang dipohon. Adalah nyata, plaintif berhak mendapat ganti rugi (lihat ms 320B–C).] A

Notes

For a case on delay in completion, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2450. B

Legislation referred to

Contracts Act 1950 s 75
Housing Developers (Control and Licensing) Act 1966 C
Housing Developers (Control and Licensing) Regulations 1989 r 11(3)
Rules of the High Court 1980 O 81

TK Lau (*Goh Eng Kee & Co*) for the plaintiff.
John Khoo (*Ismail Khoo & Associates*) for the defendant. D

Kamalanathan Ratnam J: This is the plaintiff's application under O 81 of the Rules of the High Court 1980 ('the RHC') for an order for specific performance of a sale and purchase agreement dated 17 May 1996 entered into between the plaintiff as the purchaser and the defendant as the vendor ('the agreement'). There were other consequential prayers sought. E

Facts

The defendant is a developer licensed under the Housing Developers (Control and Licensing) Act 1966. The said agreement was in respect of Plot No 77 (Lot No 10384) HS (M) 1259 of approximately 753sq ft F together with a two-storey terrace house to be erected thereon ('the property'). The total purchase price was RM145,000. The purchaser then charged the said property to Perwira Affin Bank ('the chargee') and obtained a housing loan of RM130,000. Clause 20(1) of the said agreement dealt with the completion period in respect of the said property. It reads as follows: G

> 20 Time for delivery of vacant possession
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> (1) The said Building shall be completed by the Vendor and vacant possession, with the connection of water and electricity supply to the said Building, shall be handed over to the Purchaser within twenty-four (24) calendar months from the date of this Agreement. H
>
> (2) If the Vendor fails to hand over vacant possession of the said Building, together with the connection of water and electricity supply to the said Building, in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) p.a. of the purchase price. I

Clause 7 stipulates that time was of the essence to the contract. The defendant failed to complete the contract and deliver vacant possession

within the stipulated 24 calendar months, that is, by 16 May 1998. However, by a letter dated 25 July 2000 the defendant informed the plaintiff that as of that date he was ready to hand over vacant possession of the said property to the plaintiff. In the said letter, the defendant also requested the plaintiff to settle all overdue balances. The actual date of handing over of vacant possession was 8 August 2000. There is no dispute between the parties that the delay from date of delivery was 813 days. The plaintiff calculated the liquidated damages due for the 813 days as amounting to RM32,297.26. It is also not in dispute that there was due to the defendant a final progress payment of RM29,000. By a notice of demand dated 10 August 2000, the plaintiff set off from the sum of RM32,297.26 due to him from the defendant, the final progress payment of RM29,000 due from him to the defendant and demanded the balance of RM3,297.26. The defendant refused and hence, the suit.

Findings of the court

By a separate letter dated 25 July 2000, the defendant admitted that the plaintiff was entitled to the claim for liquidated damages as stated in cl 20 of the said agreement. Since no submission was even made as to the propriety or otherwise of such a clause and the applicability of s 75 of the Contracts Act 1950, I shall proceed on the basis that the defendant has conceded that cl 20 is effective and is applicable. The only argument raised by Mr John Khoo for the defendant was that before the defendant could seek a prayer for specific performance and the consequential orders, the plaintiff himself must honour the agreement by making full payment first. This is because the developer had applied to the Ministry of Housing for an extension of time. Counsel referred me to a letter from the defendant to the Controller, Ministry of Housing and Local Government ('the controller') dated 22 July 2000 seeking an extension of time to complete the payment. It is therefore important to look at the regulation that allows the developer to make such an application to the Controller for extension of time. The relevant regulation is r 11(3) of the Housing Developers (Control and Licensing) Regulations 1989. It reads as follows:

> II Contract of Sale
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> (1) ...
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> (2) ...
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> (3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:
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> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the controller.

Mr Khoo's argument was doomed from inception. The proviso to sub-s (3) states clearly that such an application for extension of time will not be approved unless it is made before the expiry of the 24 months stipulated in

the agreement. Here, the defendant made this application for extension of time on 22 July 2000 stating various reasons. Yet three days later, by the proverbial wave of the magic wand, the defendant was able to put right the long list of complaints enumerated in its letter dated 22 July 2000 being the reasons why it was seeking the extension of time. Obviously that application was made as an afterthought to prop up its case to defeat this legitimate claim of the plaintiff. In any case, the defendant is caught by the proviso. As the application was made at least three years and two months after the completion date, the application was a non-starter. No wonder even the controller had not replied to the defendant's letter. In any case, since the application was made out of time there is no room even for the court to exercise any discretion. I do not, even at this point, have to consider that there is no certificate in writing from the controller giving the defendant the extension of time sought. Clearly, the plaintiff is entitled to the damages.

I, therefore, gave the following orders:

(1) a declaration that the defendant is indebted to the plaintiff in the sum of RM32,297.26 being damages arrived between 17 May 1996 to 8 August 2000;

(2) that the plaintiff is entitled to set off from the sum of RM32,297.26 the sum of RM29,000 due and owing from the plaintiff to the defendant as final progress report;

(3) that the defendant do pay the plaintiff the sum of RM3,297.26;

(4) that the defendant do hand over to the plaintiff all the keys to the vacant property unconditionally within seven days of this order;

(5) that the defendant do pay interest on the sum of RM3,297.26 at 4% pa from 25 August 2000 to date of judgment;

(6) that no damages be awarded; and

(7) costs.

Order accordingly.

Reported by Wong Ee Lynn